STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. COUNTY OF VENTURA, Respondent.	Case No. LA-CE-615-M PERB Decision No. 2272-M June 14, 2012

Appearances: Lawrence Rosenzweig, Attorney, for Union of American Physicians & Dentists; Matthew A. Smith, Assistant County Counsel, for County of Ventura.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Ventura (County) to the proposed decision of a PERB administrative law judge (ALJ) arising out of an unfair practice charge filed by the Union of American Physicians & Dentists (UAPD). The complaint and underlying charge alleged that, during negotiations for an initial memorandum of understanding, the County refused to bargain with UAPD over released time and refused to provide UAPD with a list of issues over which the County had authority to negotiate as a joint employer. It was alleged that the County, by engaging in this conduct, failed and refused to bargain in good faith in violation of the Meyers-Milias-Brown Act (MMBA)[1] section 3505; interfered with the rights of bargaining unit employees to be represented by UAPD in violation of MMBA section 3506; and denied UAPD its right to represent bargaining unit employees in violation of MMBA

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

section 3503. It was further alleged that this conduct constituted unfair practices under MMBA section 3509, subdivision (b) and PERB Regulation 32603, subdivisions (c), (a) and (b).[2]

The Board has reviewed the entire record in this case, and given full consideration to the issues raised on appeal and the arguments of the parties. Based on our review, the Board hereby vacates the proposed decision and remands the case to the ALJ to conduct a further *expedited* formal hearing on the matter. The Board directs the ALJ to develop a full and complete evidentiary record on the jurisdictional issue of whether the County is a joint employer of the physician employees such that these employees may be deemed "employed by" the County as a matter of law; and further directs the ALJ to make a determination on that legal issue in a new *expedited* proposed decision consistent with the Board's decision herein. This remand is ordered to ensure that there is a firm jurisdictional foundation upon which to impose a bargaining order and any other appropriate remedy should the County be found to be a joint employer of physician employees. The reasons for our decision are set forth below.

BACKGROUND AND SUMMARY OF FACTS

The County's Local Rules

Labor relations in the County are governed by Article 20, entitled Employer/Employee Relations, of the County's Personnel Rules and Regulations (local rules). The pertinent provisions are:

> ***Sec. 2003 Definitions: . . .***
>
> K. Employee Organization – means any organization or union which includes employees of the County and which has as one of its primary purposes representing such employees in their employee relations with the County.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

U. Public Employee and Employee – means any person employed by the County, excepting those persons elected by popular vote or appointed to office by the Governor of this State.

V. Recognized Employee Organization – means an employee organization formally acknowledged by the County as representing an [sic] majority of employees in an appropriate unit.

Sec. 2009 Formal Acknowledgement of Recognized Employee Organizations: . . .

I. Upon receipt of the aforesaid documents from an employee organization, the Director-Human Resources shall within 30 days establish a unit or units based upon the criteria as set forth in Section 2008 of this Article and shall issue a certificate to the employee organization a copy of which shall be filed with the Board, setting forth such unit or units, provided that verification of the proof submitted established that a majority of the employees involved have designated such employee organization to represent them.

J. If the applying employee organization or any other employee organization desires to protect [sic] the determination of the Director-Human Resources, it shall within 10 days file its protest with the Director-Human Resources, requesting a review by the Commission. The Director-Human Resources may request review upon his own motion.

K. The Commission may sustain, modify or reverse the unit determination of the Director-Human Resources. It may then conduct an election in accordance with the rules and procedures of the State Conciliation Service and certify the results therein, or the matter may be returned to the Director-Human Resources for appropriate action.

L. The unit or units thus certified may not be protested, modified or decertified until the expiration of one year from the date of the certification.

Sec. 2012 Modification Procedure:

A. If a representation unit has been established, that unit shall not be contested for at least one year from the date of determination. The procedure for modifying a unit shall be the same as found in Section 2011 of this Article [Decertification Procedure]. In the cased of a multi-year agreement, a unit modification can only occur during the second and subsequent years of the agreement.

> ***Sec. 2013 Withdrawal of Certification***: The County shall not deny, suspend, or withdraw its certificate without a showing of a failure to comply with this Article and until the County has first given 30 days notice to the recognized employee organization of the deficiency and has further given it a reasonable opportunity to make any modification or amendments or take any action that may be require [sic].

The Prior PERB Proceedings

The dispute between the County and UAPD is longstanding. It goes back five and one-half years. The first phase of the dispute was the subject of prior administrative litigation at PERB, which resulted in a decision of the Board itself in *County of Ventura* (2009) PERB Decision No. 2067-M (*Ventura I*). For a full understanding of the issues in the instant case, the origins of the parties' dispute, as gleaned from the Board's decision in *Ventura I*, are summarized here.

On October 6, 2006, UAPD sought formal recognition under the County's local rules as the exclusive representative for primary care physicians working at outpatient clinics operating under contract with the County. On October 31, 2006, the County denied UAPD's request for recognition. The County asserted that the physicians were not employed by the County, but by the clinic operators. Under the local rules, UAPD appealed the County's decision, requesting review by the Civil Service Commission – Board of Review and Appeals of the County of Ventura (Commission). The County rejected UAPD's appeal, declining to refer the matter to the Commission for review as requested.

On December 13, 2006, UAPD filed an unfair practice charge against the County. On March 19, 2007, the Office of the General Counsel issued a complaint alleging that the County violated the MMBA by refusing to process UAPD's petition for recognition and by refusing to process the appeal. The County answered the complaint, asserting that it was not a public

employer of the physicians. An informal settlement conference was conducted on May 2, 2007, but the parties were unable to resolve their differences. On June 12, 2007, the County filed a motion to dismiss the complaint on the grounds that the County was not the physicians' employer; the contracts between the County and the clinic operators had been revised in 2007 to reflect the same; and given that the employers of the physicians were private corporations, PERB lacked jurisdiction to hear the dispute. The motion was denied by the Chief ALJ who found that these issues were more properly reserved for formal hearing. The formal hearing took place on October 16 and 17, 2007. On January 10, 2008, the ALJ issued a proposed decision.

In reaching his conclusion that the County was a joint employer of the physicians, the ALJ relied, in part, on contracts between the County and the clinic operators executed between January and July 2005, approximately one and one-half years prior to UAPD's request for recognition. In referring to the fact that the County and the clinic operators entered into new contracts in May 2007, the ALJ found that "[t]he purpose of the changes in the new agreement was to remove the sections of the prior agreements upon which the unfair practice charge was filed." (*Ventura I, supra*, proposed decision, p. 14.) The new contracts were received into evidence only to show that the parties' agreements had changed after the request for recognition was filed, but not for the purpose of determining whether there had been a change in the employment relationship between the County and the physician employees. The ALJ found:

> The specific changes to the agreement and whether they changed the labor relations landscape of whether VCMC [Ventura County Medical Center] was the employer of the physicians employed at the Clinics was irrelevant as the new agreements did not reflect the status of the employment relationship at the time the petition for recognition was filed with the County.

(*Ibid.*)

UAPD urged that the appropriate remedy would be to order the creation of a bargaining unit of physicians and to order the County to recognize UAPD as the exclusive representative of that bargaining unit. The ALJ found otherwise:

> It is not appropriate to direct the County to recognize UAPD and conduct an election as these remedies are premature. The establishment of a bargaining unit was not litigated or set forth in the complaint, and an appropriate unit has not been decided by the County's own local rules. Under the legislative scheme set forth in the MMBA and PERB Regulations, recognition, elections and unit determinations are to be resolved according to reasonable rules adopted by the public agency (MMBA sections 3507(a)(3) and (4), and 3507.1(a)).

(*Ventura I, supra,* proposed decision, p. 20.)

The ALJ did not direct the County to recognize UAPD, but rather to process UAPD's request for recognition under the local rules. As the ALJ found, "[b]ecause the violation of non-recognition occurred first, it is only logical that the remedy to that violation should be completed before a new employment relationship is considered." (*Ventura I, supra,* proposed decision, p. 19.) The ALJ also found that the County did not violate the local rules in failing to process UAPD's appeal because the appeal procedure was limited to unit determinations, and no unit determination had yet been made.

The proposed decision of the ALJ was adopted by the Board in *Ventura I*, which issued on September 29, 2009. In responding to the County's exceptions objecting to the ALJ's joint employment finding on the grounds that the new contracts entered into by the parties in May 2007 showed otherwise, the Board found:

> Copies of the new contracts were admitted to show that subsequent to the filing of the petition, the agreements had changed. The County excepts to this ruling, arguing that the new contracts should have been admitted as evidence of the parties

> intent that the clinic physicians are not employees of the County. We agree with the ALJ's finding that the new contracts do not reflect the status of the employment relationship at the time the petition for recognition was filed and are therefore irrelevant for this purpose.

(*Ventura I, supra,* p. 4, fn. 6.)

Neither UAPD nor the County appealed the Board's decision.

The Current PERB Proceedings

Pursuant to the order of the Board, the County's Director-Human Resources (DHR) processed UAPD's request for recognition and found that "while the UAPD had met most touchstones required of a petition demanding recognition," the DHR could neither accurately determine the appropriate unit nor the level of employee support. Based on those deficiencies, the DHR denied UAPD's request for recognition. On December 9, 2009, pursuant to Section 2009-J of the local rules, the DHR forwarded the matter to the Commission, recommending that the Commission deny UAPD's request for recognition. At the January 28, 2010, business meeting of the Commission, the Commission rejected the DHR's recommendation and ordered the DHR to accept and review a package of authorization cards offered by UAPD.

In a letter to the Commission dated February 23, 2010, the County's Program Management Analyst, James A. Dembowski (Dembowski), stated:

> Analysis of the now (as of January 28, 2010) completed/perfected October 2006 petition has led to the following findings:
>
> **THE BARGAINING UNIT**
>
> The UAPD seeks to represent a bargaining unit comprised of physicians employed in the County's satellite outpatient clinics. The DHR has determined that it is appropriate to refer to the proposed bargaining unit as the "Satellite Clinic Physicians Bargaining Unit." The unit shall be comprised of all full and part-time, licensed medical primary care physicians employed in the County's satellite outpatient clinics, and over whom the

> County exercises some authority as a joint-employer with the owners and /or operators of the satellite clinics, as determined by the PERB in Ruling 2067-M, excluding supervisors and managers. For purposes of determining what persons and positions are included in the bargaining unit, only the following clinics shall be considered to have been a satellite outpatient clinic of the County on October 6, 2006.
>
> . . . . . .
>
> **"APPROPRIATENESS" OF BARGAINING UNIT**
>
> As per section 2008 of the PR&Rs, and in accord with PERB Ruling 2067-M, the "Satellite Clinic Physicians Bargaining Unit" is an appropriate, stand-alone unit. Its "community of interest" is based on the criteria of the incumbents being non-supervisorial/non-managerial, full and part-time professional licensed physicians who were "jointly employed" (as per the above-referenced PERB Ruling) in October 2006 at the specified outpatient satellite clinics.
>
> **SUPPORT FOR PETITION**
>
> Analysis of those cards submitted on January 28, 2010 revealed that of the forty-three (43) submitted, only thirty-two (32) were signed by full and part-time primary care physicians working in 2006 at the various satellite clinics contracted with the Ventura County Healthcare Agency. . . . Thus, it now appears to be evident that the October, 2006 petition by which the UAPD attempted to demand recognition was supported by 52.5% of the individuals in what is now considered to have been the appropriate unit.
>
> **CERTIFICATE OF RECOGNITION**
>
> In accord with Sections 2008 & 2009 of the PR&Rs
> and Section 3507.1(c) of the Meyers-Milias-Brown Act,
> the Union of American Physicians and Dentists (UAPD) is hereby recognized as the
> "exclusive bargaining representative" for the above-defined
> "Satellite Clinic Physicians Bargaining Unit."
>
> In light of the foregoing, there does not appear to be any need for further action by your Commission. . . .

At the Commission's regular business meeting on February 25, 2010, the Commission took up as old business the DHR's request for review of its determination on UAPD's petition

for recognition. The Commission acknowledged Dembowski's letter of February 23, 2010, "indicating that the unit has been certified." UAPD's attorney was present at the meeting and agreed to accept the County's certificate of recognition. To conclude the matter, the Commission voted unanimously to relinquish its jurisdiction.

Soon thereafter, UAPD requested bargaining with the County, and a session was scheduled for May 5, 2010. By e-mail of April 26, 2010, UAPD requested that Dembowski make sure that certain physicians were released from their shifts so that they could participate in the bargaining session. Dembowski replied that the County could not cause the physicians to be released from their duties and that those arrangements had to be made with the clinic operators.

The parties met for bargaining sessions on May 5, May 25, June 8 and June 15, 2010. Very little is known about what the parties discussed at these sessions. UAPD representative David Trujillo (Trujillo) testified that during the negotiating sessions, the County took the position that it had no authority to negotiate any mandatory issues. Trujillo also testified that the County did not identify the issues over which the County did have authority to negotiate.

The parties were supposed to meet again on July 29, 2010, but that bargaining session never occurred and no further sessions were scheduled. Dembowski had sent Trujillo a letter on July 27, 2010, which stated in pertinent part:

> At the outset, it has truly been a pleasure engaging in dialogue with you in the attempt to attain clarity as to what, if any, substantive relationship may exist between the County and the UAPD. . . . [¶] As you have acknowledged, these circumstances are, indeed, unique. Nevertheless, the County has maintained that it is not required to bargain any terms and conditions of employment over which the County does not have control and the County has never accepted the UAPD's assertion that PERB's ruling made the County a joint employer for all purposes and for all time. [¶] While the County has met with UAPD, the County has also been assessing the current status and relevance of the "joint employer" ruling. PERB's decision left open the question of whether subsequent

> changes made in the County's contracts with the clinic operators would affect the County's current status as a joint employer of the clinic physicians. In fact, the County does not have control over the terms and conditions of the clinic physicians' employment. The physicians are employed by the corporations that operate the clinics. Control over the terms and conditions of employment rests with those entities. [¶] Accordingly, it is the County's position that it is not a joint employer of the clinic physicians and has no duty or authority to bargain with UAPD over the terms and conditions of the Clinics' physicians' employment. Thus, the County will not meet further with UAPD and will not bargain over the wages, hours, terms and other conditions of employment applicable to the physicians employed by the independent clinic owner/operators.

On June 29, 2010, UAPD filed an unfair practice charge against the County.[3] The Office of the General Counsel issued a complaint on July 30, 2010. The County answered the complaint on August 24, 2010, denying that it is "an employer of the physicians in the alleged bargaining unit." After the parties were unable to settle their differences at an informal settlement conference on August 17, 2010, PERB held a formal hearing on November 30, 2010.[4] After receipt of post-hearing briefs, on February 4, 2011, the ALJ took the case under

[3] The unfair practice charge was filed after the parties' bargaining session on June 15, 2010, but before the last scheduled bargaining session of July 29, 2010, and Dembowski's letter of July 27, 2010, stating that the County was opposed to further bargaining. A copy of the July 27, 2010, letter was filed with PERB as a separate submission on July 30, 2010. On November 15, 2010, UAPD filed a motion to amend the complaint to allege the County's opposition to bargaining as communicated in Dembowski's letter.

[4] On September 8, 2010, UAPD filed a motion for summary judgment and/or motion in limine, and a memorandum of points and authorities in support thereof, seeking to preclude the County from disputing either the appropriateness of the bargaining unit or its joint employment status. On October 18, 2010, the County filed its response, and in support thereof also filed (1) declarations executed by Dembowski, a clinic operator and the former deputy director of ambulatory care for the County's Health Care Agency; (2) copies of the 2007contracts; and (3) a copy of an amended contract entered into in 2010. After the luncheon recess during the formal hearing, the ALJ granted UAPD's motion in limine. The ALJ explained that, under the County's local rules, an established unit cannot be contested for one year from the date of determination. The ALJ viewed the County's efforts to demonstrate that it was not a joint employer at the time of the alleged violation as an effort to modify the unit in violation of its own local rules.

submission. The ALJ issued a proposed decision on August 24, 2011, which is the subject of this appeal.

THE ALJ'S PROPOSED DECISION

The ALJ found that by granting UAPD recognition under the County's local rules, the County accepted the obligation to bargain in good faith under MMBA section 3505 and to provide released time for the physicians under MMBA section 3505.3. The ALJ concluded that the County's refusal to bargain with UAPD violated MMBA section 3505. The County's conduct also violated MMBA section 3503, which guarantees employee organizations the right to represent employees, and MMBA section 3506, which prohibits interference with employee rights guaranteed under MMBA section 3502. The ALJ rejected the County's argument that it was not a joint employer for the same reason the ALJ refused to entertain the County's evidence on this point at the formal hearing. The ALJ reasoned that to entertain the County's argument would be to allow the County to violate its own local rules prohibiting representation unit modifications or contests for one year.

To remedy the County's refusal to bargain, the ALJ proposed: (1) a cease and desist order; (2) an order that the County request that employees be released for bargaining; (3) an order that the County recognize UAPD as the exclusive representative for one year from the date of finality of the decision; (4) an order that the County post a notice; and (5) an order that the County pay UAPD's attorney's fees and costs.

THE COUNTY'S EXCEPTIONS

The County filed exceptions to several parts of the proposed decision, which boil down to one essential argument, i.e., the County since at least May 2007 has had no right to control the terms and conditions of the physician's employment and therefore it is not a joint employer and consequently has no duty to bargain under the MMBA. The County contends that the ALJ

erred in granting UAPD's motion in limine to exclude evidence bearing on the joint employment issue. The County also excepts to the one-year duration of the recognition order as violating the local rules; the order requiring the County to pay UAPD's attorney's fees as unwarranted under PERB precedent; and the order requiring the County to request released time given the County's lack of control over the terms and conditions of the physicians' employment.

UAPD'S RESPONSE

UAPD takes no exception to the proposed decision. Because the County did not appeal the Board's decision in *Ventura I* and chose to recognize UAPD under the County's local rules, UAPD argues that the County's joint employer status as determined by the Board in *Ventura I* cannot be re-litigated and obligates the County to bargain.[5]

DISCUSSION

PERB Jurisdiction

The analysis of the ALJ and the arguments of the litigants address legitimate concerns raised by the unique labor relations issues and procedural history of this case. The ALJ's concern is that, given the County's claim that it is not a joint employer, the County's recognition of UAPD as the exclusive bargaining representative of the physician employees was misleading and nothing more than a "sham" perpetrated by the County on the Commission. The ALJ's solution is to apply the local rule governing unit modification, which prohibits parties from contesting an established unit for one year from the date of

[5] UAPD also asserts that the County's exceptions are based in part on facts not contained in the record and that the County did not except to several key findings in the proposed decision. Neither extra-record evidence nor exceptions never before raised have been considered on appeal. Only matters contained in the record are before the Board (PERB Reg. 32300, subd. (b)); and exceptions not specifically urged are waived (PERB Reg. 32300, subd. (c)).

determination. The ALJ includes the County's dispute over its joint employment status as a "contest" so prohibited thereunder.

For UAPD's part, it sought recognition from the County in 2006 and the parties have been at a virtual standstill ever since as the parties have been engaged in administrative litigation and Board review. When the opportunity for collective bargaining arose, negotiations petered out before they ever left ground. UAPD's solution is to hold the County to the joint employer determination made by the Board in *Ventura I* because the County never challenged *Ventura I* in court and instead formally recognized UAPD without advising the Commission of its objections.

For the County's part, by its certification of UAPD, it believed it was merely complying with the Board's directive in *Ventura I* to "process the petition." The County did not challenge *Ventura I* in court because it was willing to accept that it was a joint employer as a matter of law as of the date UAPD requested recognition on October 6, 2006. During the administrative litigation of both PERB charges that followed, the County's attempts to establish that it was no longer a joint employer were defeated. The County's solution is to resist collective bargaining by further arguing this point.

While we are cognizant of the various concerns as summarized above, we see the issue presented here as whether PERB has jurisdiction, not whether the County is in compliance with local rules governing representation matters like unit modification.[6] While the County is a "public agency" within the meaning of MMBA section 3501, subdivision (c), a further jurisdictional question is whether the physician employees are "employed by" the County

[6] We note, however, that the County's local rules are in conformity with the MMBA on the jurisdictional issue presented here. Compare MMBA section 3501, subdivision (d), which defines "[p]ublic employee" to mean "any person employed by any public agency" with the County's local rules, section 2003, subdivision (U), which defines "[p]ublic [e]mployee and [e]mployee" to mean "any person employed by the County."

within the meaning of MMBA section 3501, subdivision (d). The answer turns on whether the County exercises sufficient *control* as a joint employer over the physician employees at the satellite clinics on negotiable matters, i.e., wages, hours and other terms and conditions of employment.[7]

We recognize that this very question was answered in *Ventura I*. We also recognize that the Board in *Ventura I* made clear that the limited issue before the Board was whether the County was obligated to process UAPD's request for recognition, which turned on the legal status of the employment relationship between the County and the physician employees at a fixed point in time, i.e., October 6, 2006, the date the request for recognition was filed. In other words, if a bona fide change in the employment relationship had occurred subsequent to the filing of the request, it was not relevant to that determination. The ALJ in *Ventura I* explicitly contemplated the possibility that PERB might one day be required to revisit the employment relationship issue in concluding that "[b]ecause the violation of non-recognition occurred first, it is only logical that the remedy to that violation should be completed before a new employment relationship is considered." (*Ventura I, supra,* proposed decision, p. 19.)

The issue here is whether the physician employees are "employed by" the County as a matter of law. If answered in the affirmative, PERB has jurisdiction to impose a bargaining order and any other relief deemed necessary to effectuate the purposes of the MMBA. If answered in the negative, it must be concluded that PERB has no jurisdiction to decide the issues raised by the unfair practice charge. While ordinarily we would prefer an approach that resolves rather than prolongs the parties' dispute, the circumstances of this case are unique.

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[7] See *Fresno Unified School District* (1979) PERB Decision No. 82. There, employees of a private company that contracted to provide transportation services to the school district were not "public employees" within the meaning of the Educational Employment Relations Act (codified at § 3540, et seq.) and therefore PERB had no jurisdiction over the claims.

Joint employment relationships between public and private entities are inherently complex and may be subject to change; and, to add to the complexity, of the two "joint employers" only one falls within PERB's MMBA jurisdiction.[8]

By this decision, we do not condone the County's actions. The County indubitably compounded the problem by not appealing *Ventura I*, thereby choosing not to avail itself of the opportunity to present its argument that it was no longer the joint employer of the physician employees at the satellite clinics. Instead, the County chose to certify UAPD, thereby creating a set of expectations that the County was prepared to bargain over matters within the scope of representation for which it had control.

We think it unwise, however, to compound the problem any further by overlooking the opportunity to resolve doubt concerning PERB's jurisdiction to proceed. Should UAPD prevail on remand, any bargaining and/or other appropriate orders issued by PERB will enjoy a firm jurisdictional foundation. Conversely, should the County establish on remand that a joint employer relationship no longer exists, a PERB order relieving it of the obligation to bargain will be supported by competent evidence in the record. To address UAPD's concern that there is nothing to stop the County from repeatedly raising this issue with PERB in the future, we closely will examine those circumstances should they materialize to ensure there has been no litigation conduct constituting an abuse of process.

Technical Refusal to Bargain

In opposing the County's exceptions, UAPD relies on a line of Board decisions involving unit determination challenges raised in defense of a refusal to bargain charge. In

[8] We note that there is a federal-law regulatory scheme similar to the MMBA governing private sector labor relations. *See* National Labor Relations Act (NLRA) codified at United States Code, title 29, section 151 et seq. We express no opinion, however, as to the specific applicability of the NLRA to this case.

those cases, employers cited to decisions of the National Labor Relations Board (NLRB) and the Agricultural Labor Relations Board in support of their contention that an employer may engage in a "technical refusal to bargain" as an alternative means of challenging the composition of a certified unit. (*The Regents of the University of California* (1989) PERB Decision No. 722-H.) Technical refusal to bargain proceedings developed under the federal labor relations scheme because unit determinations made by the NLRB are generally not subject to direct judicial review; by engaging in a technical refusal to bargain, the employer can obtain judicial review of the unit determination through its defense of the unfair labor practice charge. (See, e.g., *Boire v. Greyhound Corp.* (1964) 376 U.S. 473.)

The Board has held that a technical refusal to bargain cannot be used as a means to challenge the parameters of a bargaining unit. Where an employer has engaged in such a tactic, the Board will not make any factual findings on the unit configuration issues as part of the unfair practice proceeding, and the challenged unit determination remains binding on the parties. The Board rationale is that unit modification is more appropriately accomplished either by agreement of the parties or through unit modification procedures. (*Los Angeles Unified School District* (2007) PERB Decision No. 1884.)

The circumstances of this case are distinguishable. The County is not seeking to modify the bargaining unit nor does it challenge the composition of the bargaining unit in any other way. Moreover, in contrast to a unit modification dispute, a jurisdictional dispute can neither be resolved by agreement of the parties nor by a representation proceeding. (*North Orange County Regional Occupational Program* (1990) PERB Decision No. 857 [where PERB is without jurisdiction, jurisdiction cannot be acquired by the parties' consent, agreement, stipulation or acquiescence, or by waiver or estoppel].) By requiring the ALJ in this matter to resolve a jurisdictional challenge, we do not disturb the validity or vitality of the

cases cited by UAPD in which a technical refusal to bargain was used as a tactic to challenge the composition of the bargaining unit in an unfair practice proceeding.

Moreover, were we to apply Board precedent developed in cases involving unit modification disputes, we find the more analogous precedent to be the "changed circumstances" line of cases. In those cases, the Board was called upon to determine whether a change in circumstances was sufficient to warrant a variation in a previously established unit. The Board has held that "parties have the right to relitigate representation matters by demonstrating a change in circumstances." (*Regents of the University of California* (1995) PERB Order No. Ad-269-H, citing *Regents of the University of California* (1986) PERB Decision No. 586-H; *Regents of the University of California (Lawrence Livermore National Laboratory)* (1993) PERB Decision No. 974-H; *Regents of the University of California* (1993) PERB Decision No. 993-H.)

Here, the County asserts that there was a change in the County's employment relationship with the physician employees at the satellite clinics subsequent to UAPD's request for recognition in 2006. Applying the logic of the "changed circumstances" line of cases, the ALJ here would consider whether the asserted change in circumstances warrants an affirmance, modification or reversal of the joint employment determination rendered by the Board in *Ventura I.* As expressed above, the unique circumstances of this case lead us to the conclusions reached herein, and, while there is no Board precedent directly on point, neither is there any Board precedent that compels us to conclude otherwise.[9]

[9] See, for example, *Los Angeles Unified School District/Lynwood Unified School District* (1982) PERB Order No. Ad-132 (*LAUSD*), which involved the issue whether two SEIU locals were the same employee organization for purposes of determining whether one of the locals could seek representation of supervisory classified employees when the other already represented certain units of rank and file classified employees. The identical issue had been raised in another matter in which the Board's finding that the same two entities were not the same employee organization was overturned by the court. On remand from the court of

Joint Employment

The legal issue to be determined on remand is whether the County is a joint employer of the physician employees at the satellite clinics. A "joint employer" situation arises "where two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (*Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura County CCD*); *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1128 citing to *National Labor Relations Board v. Browning-Ferris Industries, Inc.* (3rd Cir. 1982) 691 F.2d 1117, 1124; see also *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332 [joint employer relationship found where two employers share in the control of labor relations and working conditions of employees].)

The joint employer analysis is focused on the relationship between the County and the physician employees at the satellite clinics. Specifically, the question is whether the County retains the right to "control both what shall be done and how it shall be done." (*Service Employees International Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761.) "The essential characteristic of employment relationship is the right to control and direct the activities of the persons rendering service, or the manner and method in which the work is to be performed." (*Ibid.*)

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appeal, and consistent with the ruling of the court of appeal, the Board held that "on the facts of that case, and as of the date of the original decision (3/25/80), the Local and Local 99 were the same employee organization" (underlining omitted). In *LAUSD*, the district argued that the court's (unpublished) ruling in the other matter was conclusive as to the "sameness" of the two locals based on principles of collateral estoppel and res judicata and therefore re-litigation of that issue should be barred. The Board disagreed, holding that a "former judgment on an identical issue is not res judicata if the factual relationship of the parties changes in a relevant way between the date of the first judgment and the relevant period of the second action."

The County appears to place emphasis on new contracts executed with the clinic operators in 2007, which, as the County argues, clarify that the physician employees are not "employed by" the County. The joint employment control test, however, requires consideration of much more than just the contracts, and the Board is not bound solely by contract language in determining the level of control exercised by the public agency over the employee. Relying on *Ventura County CCD*, the Board in *Ventura I* stated that when determining whether certain individuals are employees of a public agency, the Board "is not bound by the agency's intent, nor by declarations made in contracts between the agency and a third party." The Board went on to conclude that "the County cannot unilaterally circumvent the rights guaranteed to its employees by the MMBA through the provisions of a contract with the clinic medical directors."

As the Board in *Ventura I* stated, that the contracts set forth obligations assumed by the clinic operators in their relationship with the County "does not preclude the determination that the County retains power over the physicians as employees." The Board in *Ventura I* explained as follows:

> The Board in *Ventura, supra*, [referring to *Ventura County CCD*] acknowledged the distinction between the reservation of the right to control the result sought, and the right to control the manner and means by which this result is accomplished ([*Ventura County CCD*] citing *News Syndicate Co., Inc.* (1967) 164 NLRB 422). The Board determined that when an agency retains the right to control the manner and method in which the work is performed, that agency retains its status as an employer.

In *Ventura I*, the Board's conclusion that the County was a joint employer as a matter of law was based on factual findings by the ALJ that the County retained and exercised control over the manner and method in which the work was performed by the physician employees.

The factual findings covered areas such as hiring practices, review of individual employment agreements, salaries and specialty pay, time base reduction, discipline, restrictions regarding patient care and operational policies such as fees and dress code. On remand, this list should not be considered exhaustive but rather a starting point from which to develop a full and complete evidentiary record on the question of control. Other areas with possible relevance include supervision, training and personnel policies.

When deciding whether the County is a joint employer, the record is to be examined in light of the statutory language and purposes of the MMBA. If there is not sufficient control over negotiable subjects there can be no joint employer finding and that would excuse the County from bargaining obligations under the MMBA. If there is sufficient control, the County's refusal to bargain will be deemed a per se violation of its duty to meet and confer in good faith under MMBA section 3505 and appropriate remedies will be ordered. (See, e.g., *Sierra Joint Community College District* (1981) PERB Decision No. 179 [the district's categorical refusal to negotiate released time violated duty to bargain].)[10]

The Bargaining Obligation May Be Limited by Joint Employer Status

The County is correct that, even as a joint employer, its bargaining obligations might be limited. (*United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119 (*United Public Employees*).) If it is determined that the County is a joint employer, a well-developed evidentiary record will greatly aid the parties in determining the County's bargaining obligations, including the issue raised by UAPD in the unfair practice

[10] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting NLRA and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

charge over released time. In *United Public Employees*, the court found that the San Francisco Community College District and the City and County of San Francisco were joint employers of classified employees who worked in the district. In terms of the joint employers' respective bargaining obligations, the court in *United Public Employees* held:

> Our conclusion that the City and the District are joint employers will not affect the status quo. The Union will continue to bargain with the District over those matters in which the District exerts authority and control, and with the City over the areas within its purview.

(*Id.* at pp. 1131-1132.)

Under the unusual circumstances presented here, where the County's bargaining obligations would be limited to only those negotiable matters over which the County exercises control and where only the County is subject to PERB's jurisdiction, we recognize there may be hurdles to finding common ground and reaching agreement. The bargaining obligation, however, only requires that the parties "*try* to agree on matters within the scope of representation." (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 61-62; italics added.) As the NLRB has stated regarding bargaining obligations in a joint employment setting:

> In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances.

(*Management Training Corp.* (1995) 317 NLRB 1355.)

ORDER

Upon the foregoing discussion and the record as a whole, the Public Employment Relations Board VACATES the proposed decision of the administrative law judge (ALJ) in

Case No. LA-CE-615-M and REMANDS the case to the ALJ to conduct a further *expedited* formal hearing and issue a new *expedited* proposed decision consistent with this Decision.

Members Dowdin Calvillo and Huguenin joined in this Decision.